STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KENNETH JAY HOULIHAN,

Defendant-Appellant.
_____/

Supreme Court No. 128340

Court of Appeals No. 256534

Lower Court No. 01-2731 FC

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128340

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

I. ACCORDING TO FEDERAL AND STATE RETROACTIVITY PRINCIPLES, IS MR. HOULIHAN ENTITLED TO REINSTATEMENT OF HIS DIRECT APPEAL AND APPOINTMENT OF APPELLATE COUNSEL UNDER HALBERT V MICHIGAN, 125 S CT 2582 (2005), WHERE HALBERT APPLIES RETROACTIVELY TO ALL CASES ON COLLATERAL REVIEW AND MR. HOULIHAN'S CONVICTION NEVER BECAME FINAL FOR PURPOSES OF ENDING THE DIRECT REVIEW PERIOD?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

II. IS MR. HOULIHAN ENTITLED TO DISCIPLINARY CREDITS AGAINST THE MINIMUM AND MAXIMUM TERMS OF HIS SENTENCE BECAUSE "TRUTH AND SENTENCING" LAWS DO NOT APPLY?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

On April 24, 2001, Kenneth Houlihan pleaded guilty to first degree criminal sexual conduct[1] and possessing sexually abusive material[2], before Kent County Circuit Court Judge Dennis Leiber. *PT*[3] 3-9. He was sentenced on July 5, 2001, to concurrent prison terms of 20 to 40 years imprisonment and 13 1/3 to 20 years imprisonment, respectively. *ST 13-14.*

Mr. Houlihan made a timely request for the appointment of appellate counsel on July 25, 2001. The trial court denied the request on July 27, 2001, and on September 28, 2001, denied Mr. Houlihan's motion for reconsideration.

Acting in pro per, Mr. Houlihan sought leave to appeal in the Court of Appeals, challenging the trial court's refusal to appoint appellate counsel. On January 2, 2003, the Court of Appeals denied Mr. Houlihan's application, "for lack of merit on the grounds presented." *People v Houlihan*, Court of Appeals No. 242342.

On February 23, 2003, Mr. Houlihan sought leave to appeal in this Court, arguing that the denial of appellate counsel violated his due process and equal protection rights. This Court denied Mr. Houlihan's application on September 19, 2003, with two justices dissenting. *People v Houlihan*, 469 Mich 901 (2003).

On December 15, 2003, Mr. Houlihan filed a motion for relief from judgment in the trial court under MCR 6.500 *et. seq*. He raised two claims: that his attorney told him there was a "working agreement" for a minimum 8 to 10 year sentence, and that the victim's family

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[1]MCL 750.520b
[2]MCL 750.145c. This charge arose in file 01-002733 FH, which file is no longer pending on appeal due to procedural error on the part of Mr. Houlihan (see footnote 16, *infra*).
[3]*PT* refers to plea transcript; *ST* refers to sentence transcript; *PSI* refers to presentence investigation report.

committed a fraud on the court with the victim impact statement. The trial court denied the motion on May 27, 2004. *Order Denying Motion for Relief from Judgment.*

Mr. Houlihan filed an application for leave to appeal in the Court of Appeals on July 7, 2004, raising the same arguments made in the trial court. *People v Houlihan*, Court of Appeals No. 256543. On November 15, 2004, Mr. Houlihan additionally filed a motion to remand based on a "retroactive change in the law" concerning the appointment of appellate counsel. In support of this motion, Mr. Houlihan referred to *Bulger v Curtis*, 328 F Supp 2d 692 (ED MI 2004), which held that Michigan's system of denying appointed appellate counsel to indigent defendants convicted by guilty plea was unconstitutional. Mr. Houlihan asked to withdraw his appellate brief so that he could raise the lack of counsel issue in trial court. *Motion to Remand.*

The Court of Appeals denied both the leave application and the remand motion on February 10, 2005. Mr. Houlihan then filed an application for leave to appeal in this Court on March 31, 2005. While the application was pending, the United States Supreme Court held in *Halbert v Michigan*, __ US __; 125 S Ct 2582; 162 L Ed 2d 552 (2005), that Michigan violated the federal constitution by denying the appointment of counsel to indigent plea-convicted defendants to assist them in pursuing applications for leave to appeal in the Michigan Court of Appeals.

On September 23, 2005, this Court scheduled oral argument on the application and also directed the appointment of the State Appellate Defender Office to represent Mr. Houlihan. *People v Houlihan*, 474 Mich 866; 703 NW2d 473 (2005). The Court further directed briefing as to the retroactive application of *Halbert. Id.*

The trial court appointed the State Appellate Defender Office as appellate counsel on October 13, 2005.

ARGUMENT

I. MR. HOULIHAN IS ENTITLED TO REINSTATEMENT OF HIS DIRECT APPEAL AND APPOINTMENT OF APPELLATE COUNSEL UNDER *HALBERT V MICHIGAN*, 125 S CT 2582 (2005), ACCORDING TO FEDERAL AND STATE CONSTITUTIONAL RETROACTIVITY PRINCIPLES WHERE HALBERT APPLIES RETROACTIVELY TO ALL CASES ON COLLATERAL REVIEW AND MR. HOULIHAN'S CONVICTION NEVER BECAME FINAL FOR PURPOSES OF ENDING THE DIRECT REVIEW PERIOD.

At issue is the retroactive application of the United States Supreme Court's decision in *Halbert v Michigan*, -- US --; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Compelled by its prior decision in *Douglas v California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963), *Halbert* held that due process and equal protection principles require the appointment of appellate counsel for defendants convicted by plea who seek access to first-tier review in the Michigan Court of Appeals. US Const Amend XIV.

In resolving the question of retroactivity, the Court must remember that the "?failure to appoint counsel for an indigent [is] a unique constitutional defect ... ris[ing] to the level of a jurisdictional defect,' which therefore warrants special treatment among alleged constitutional violations." *Lackawanna County Dist. Attorney v Coss*, 532 US 394, 404; 121 S Ct 1567; 149 L Ed 2d 608 (2001) (internal quotations omitted). The right to counsel is an exceptional constitutional right, prompting one federal court to recognize that

> [e]very extension of the right to counsel from *Gideon* through *Argersinger v Hamlin*, 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972)] has been applied retroactively to collateral proceedings by the Supreme Court. * * * A score that is perfect packs punch in any analysis. [*Howard v United States*, 374 F 3d 1068, 1078 (CA 11 2004).]

On the question of the retroactive application of *Halbert*, the State of Michigan has already confessed error and agreed that the *Halbert* rule applies on collateral review. *Keyes v Renico*, unpublished opinion of the U.S. District Court, E.D. Michigan September 2, 2005 (Docket No. 05-CV-71160-DT) (Opinion, Appendix A).

Issue Preservation:

Mr. Houlihan preserved his request for the appointment of appellate counsel by raising it in the trial court, on direct appeal, and again on appeal of the order denying his motion for relief from judgment.[4]

Standard of Review:

Whether a judicial decision should apply retroactively is a question of law reviewed *de novo*. *People v Sexton*, 458 Mich 43, 52; 580 NW2d 404 (1998).

A. *HALBERT* IS FULLY RETROACTIVE TO ALL CASES ON COLLATERAL AND DIRECT REVIEW.

While Mr. Houlihan's direct appeal period has not expired (see Section B, infra), he would first address whether *Halbert* should be given full retroactive effect on collateral review in light of this Court's order of September 23, 2005, suggesting consideration of *Teague v Lane,* 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), *Beard v Banks,* 542 US 406; 124 S Ct 2504; 159 L Ed 2d 494 (2004), and *Howard v United States*, 374 F3d 1068 (CA 11, 2004). 474 Mich 866. Under any analysis, *Halbert* applies to Mr. Houlihan because the decision in *Halbert*

[4]While Mr. Houlihan did not raise the request in his initial motion for relief from judgment, he cannot be faulted for failing to do so as he was barred by MCR 6.508(D)(2) (barring relief on grounds previously rejected unless there has been a "retroactive change in the law.") When *Bulger v Curtis*, *supra*, was released, Mr. Houlihan sought to apply that case to his situation by seeking remand in the Court of Appeals on November 15, 2004. This motion was denied. He reasserted his right to appointed appellate counsel in this Court through his application for leave to appeal.

did not announce a new rule. Even if it could be deemed a new rule, *Halbert* represents a watershed rule of criminal procedure. It also represents a rule of such constitutional significance for state retroactivity purposes that it must be deemed fully retroactive.

As an initial matter, it is unclear whether the retroactivity analysis of *Teague v Lane, supra,* binds a state court considering the matter on collateral review. While state courts must apply new federal constitutional rulings to cases pending on direct review, *Griffith v Kentucky,* 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987); *People v Sexton*, supra at 54, some have questioned the United States Supreme Court's authority to prescribe rules of retroactivity for the state courts (for direct or collateral review). Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 Mich St. L. Rev 541. While the *Teague* test is constitutionally required for federal collateral review, Mr. Houlihan contends that *Teague* merely sets forth the most restrictive test for any state court retroactivity decision involving federal constitutional law. *See, Yates v Aiken*, 484 US 211, 217-218; 108 S Ct 534; 98 L Ed 2d 546 (1988) (rejecting contention that states are free to impose their own, more restrictive retroactivity rules).

This Court is free to consider a more favorable retroactivity analysis for purposes of state law as the *Teague* test is arguably harsher than necessary for state collateral review. *Teague* was prompted, in part, by concerns of comity and federalism. *Teague* at 489 US at 308, 310; *Stringer v Black*, 503 US 222, 235; 112 S Ct 1130; 117 L Ed 2d 367 (1992). These concerns do not inhere in a collateral state court proceeding. Moreover, the *Teague* concerns over finality, 489 US at 308, are somewhat less compelling when applied to state collateral review that itself forms a second tier of appellate review (following direct appellate review and prior to the more distant form of federal habeas corpus review). *See*, Entzeroth, *Reflections on Fifteen Years of the*

Teague v Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine, 35 NW L Rev 1670-171 (2005).

Ultimately, whether this Court applies the *Teague* test or the more lenient retroactivity analysis of *People v Hampton*, 384 Mich 669; 187 NW2d 404 (1971) (applying test of *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965)),[5] *Halbert* is fully retroactive.

***Halbert* Is Not a "New Rule"**

The restrictive retroactivity analysis of *Teague* does not apply unless a decision has created a "new rule" of criminal procedure. A rule is new for federal retroactivity purposes "if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Graham v Collins*, 506 US 461, 467; 113 S Ct 892; 122 L Ed 2d 260 (1993) (*quoting Teague*, 489 US at 301); *Stringer*, 503 US at 229. Categorizing a rule as "new" or "old" requires a survey of the legal landscape at the time the conviction became final to determine whether then-existing precedent dictated the rule on which the defendant relies. *Beard*, 124 S Ct at 2504.

The United States Supreme Court has long recognized that a decision is not a new rule where it merely "applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Mackey v United States*, 401 US 667, 695; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (quotations omitted). Accord, *Williams v Taylor*, 529 US 362, 381; 120 S Ct 1495; 146 L Ed 2d 389 (2000). As explained in *United States v Johnson*, 457 US 537, 549; 102 S Ct 2579; 73 L Ed 2d 202 (1982):

> when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as

[5] The *Linkletter* analysis was later abandoned by the federal courts in *Griffith v Kentucky*, *supra* (cases on direct review) and *Teague v Lane, supra* (cases on collateral review).

> to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Accord, *Yates v Aiken*, 484 US at 217-18.

Yates illustrates this point. In *Yates*, the trial judge instructed the jury to apply a mandatory presumption of intent once the state proved certain elements of the offense. This burden-shifting instruction was held to violate due process in *Francis v Franklin*, 471 US 307; 105 S Ct 1965; 85 L Ed 2d 344 (1985), which was decided after Yates's conviction became final. The Court held that *Francis* applied to *Yates*, recognizing that *Francis* did not establish a new rule but was "merely an application of the principle that governed our decision in *Sandstrom v Montana*, which had been decided before petitioner's trial took place." Yates, 484 US at 217 (citing *Sandstrom v Montana,* 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979)).

Similarly, in *Stringer v Black*, the defendant received a death sentence based on a jury finding that the murder was "especially heinous, atrocious, or cruel." Later, the Court in *Maynard v Cartwright*, 486 US 356; 108 S Ct 1853; 100 L Ed 2d 372 (1988), and *Clemons v Mississippi,* 494 US 738; 110 S Ct 1441; 108 L Ed 2d 725 (1992), struck down an identically-worded death penalty aggravator because it was so vague and imprecise that it violated the Eighth Amendment. The Court held that *Clemons* and *Maynard* applied to Stringer on collateral review. The Court noted that *Clemons* and *Maynard* were based on its prior holding in *Godfrey v Georgia* 446 US 420; 100 S Ct 1759; 64 L Ed 2d 398 (1980), which had ruled that Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravating factor was unconstitutionally vague. *Stringer*, 503 US at 229. The Court reasoned:

> [the death penalty aggravators in] *Godfrey* and *Maynard* did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling in *Godfrey* was limited to the

> precise language before us in that case. In applying *Godfrey* to the language before us in *Maynard*, we did not "brea[k] new ground." . . . *Maynard* was therefore, for purposes of *Teague*, controlled by *Godfrey* and it did not announce a new rule. [503 US at 229-230.]

Applied here, it would be a mistake to conclude that the various Supreme Court cases addressing the right to appointed appellate counsel prior to *Halbert* were limited to the specific facts of those cases. Years before *Halbert,* the United States Supreme Court had definitively set forth the parameters of the right to appellate counsel through a series of cases. *See Halbert,* 125 S Ct at 2587. *Douglas v California* held that states must appoint counsel for indigent defendants' first appeal of right from felony convictions. 372 US at 355. This holding was based on two considerations. First, the appeals in those cases were "on the merits." *Id.* at 357; *see also Halbert*, 125 S Ct at 2587. Additionally, first-tier review differs from subsequent appellate stages "at which the claims have once been presented by a lawyer and passed upon by an appellate court." *Douglas*, 372 US at 356; *Halbert, supra*. In light of this, the Court held "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas*, 371 US at 357.

Ross v Moffitt, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 31 (1974), held that a state need not appoint counsel to an indigent defendant pursing a second-tier discretionary review in the State's highest court. The Court reasoned that *Douglas's* rationale did not extend to second-tier discretionary review because, at that stage, error correction is not the reviewing court's primary function. 417 US at 615. Rather, the principal criteria for high court review in that case were considerations other than the merits, such as whether the issues were of significant public interest. *Id.* Further, unlike the *Douglas* appellants, a defendant who had received counsel's aid

in a first-tier appeal would be armed with a transcript or other record of trial proceedings, an appellate brief setting forth his claims, and, often an appellate court opinion. *Id.*

Douglas and *Ross* establish a fundamental rule that is susceptible to general application: The right to counsel extends to first-tier, merit-based appeals, but no further. The right does not extend to discretionary appeals directed to second-tier appellate courts, nor does it apply to cases on collateral review. *Pennsylvania v Finley*, 481 US 551; 107 S Ct 1990; 95 L Ed 2d 539 (1987); *Wainwright v Torna*, 455 US 586; 102 S Ct 1300; 71 L Ed 2d 475 (1982). The Court made clear in *Douglas, Ross* and in cases that followed that the triggering mechanisms for the right to appellate counsel are: (1) first-tier appeals, and (2) review of the merits (error correction). *See United States v MacCollom*, 426 US 317, 324; 96 S Ct 2086; 48 L Ed 2d 666 (1976) (explaining that Ross "declined to extend *[Douglas]* to a discretionary second appeal from an intermediate appellate court to the Supreme Court of North Carolina."); *see also, Murray* v *Giarratano*, 492 US 1, 9; 109 S Ct 2765; 106 L Ed 2d 1 (1989) (noting that an indigent is "entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court," but that right "did not carry over to a discretionary appeal provided. . . from the intermediate appellate court to the Supreme Court of North Carolina."); *see also Evitts v Lucey,* 469 US 387, 402; 105 S Ct 830; 83 L Ed 2d 821 (1985) (right to counsel on "conditional" appeals in Kentucky required under *Douglas* because those appeals were not "discretionary" as defined by *Ross* and Kentucky Court of Appeals was first- tier appellate tribunal to address merits).

Hence, the parameters of the right to appointed appellate counsel on first-tier, error correction review were firmly in place at the time of *Halbert.* In the *Halbert* Court's view, resolution of the issue presented was a relatively simple task. It hinged not upon the extension of

or retrenchment from existing rules or previous holdings, but upon the proper "classification" of Michigan's appellate system based on the facts presented: "The question at hand. . . is whether this case should be bracketed with *Douglas v California*. . . because appointed counsel is sought for initial review before an intermediate appellate court, or with *Ross v Moffitt*. . . because a plea-convicted defendant must file an application for leave to appeal." *Halbert*, 125 S Ct at 2590, n.2.

The Court concluded that the facts before it were in all material respects so similar to *Douglas* that "*Douglas* provides the controlling instruction." *Halbert*, 125 S Ct at 2590. This conclusion was based on three similarities between the Michigan system and the system in *Douglas*. First, the Michigan Court of Appeals is a first-tier appellate tribunal. *Id.* Second, "[of critical importance]," that court "sits as an error-correction instance" because it routinely passes on the merits in deciding leave applications. *Id.* Because of this, *Halbert* rejected the claim that *Ross* applies because leave applications are "discretionary" as that term was defined by Ross and subsequent cases. *Id.* at 2584-85; *see also Evitts*, 469 US at 402. And third, like in *Douglas* "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves," because they have never received the aid of an appellate counsel, and they are not armed with a previously-filed appellate brief or court opinion outlining and disposing of their claims. *Id.* at 2591-93.

It is thus readily apparent that *Halbert* broke little new ground. It simply concluded on the facts before it that its decision was controlled by *Douglas*. Similar to *Stringer* and *Yates*, application of this 42-year old Supreme Court case *(Douglas)* neither announced nor resulted in a new rule -- it merely applied settled precedent to a variant of facts that were analogous to those previously addressed by the Court.

Mr. Houlihan would add that reasonable jurists, by the year 2000, would have concluded that *Douglas* dictated the result in *Halbert*. *See Beard*, 125 S Ct at 2511 (noting that new rule is created where "reasonable jurists" would have disagreed over the holding). *Halbert* was foreshadowed in 1974 when a federal court held: "It is 'invidious discrimination' for the Michigan Court of Appeals to consider the merits of an indigent's first late appeal [by leave application] without benefit of counsel while allowing a rich man to employ counsel." *Mata v Egeler,* 383 F Supp 1091, 1093-1094 (E.D. Mich. 1974). And the *Halbert* result was clearly predicted in 2000 with *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich 2000) (holding unconstitutional Michigan statute denying counsel to plea convicted defendants), and then again in 2003 with *Tesmer v Granholm*, 333 F 3d 683, 701 (CA6 2003) (affirming unconstitutionality of statute), *reversed on other ground in Kowalski v Tesmer*, 543 US 125; 125 S Ct 564; 160 L Ed 2d 519 (2004). Most recently, another federal court held, prior to *Halbert*, that this Court's decision in *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000), was an "unreasonable application" of *Douglas*. *Bulger v Curtis*, 328 F Supp 2d 692, 702-703 (ED Mich, 2004). See also, *Keyes v Renico*, supra. [6]

Mr. Houlihan is thus entitled to the benefit of the *Douglas* rule and specific application of that rule in *Halbert* under *Teague v Lane*, supra. This was not a new rule of constitutional

[6] Given the prior decisions of the United States Supreme Court, it is not surprising that with the single exception of this Court's decision in *People v Bulger*, 462 Mich 495 614 NW2d 103 (2000), no state or federal appellate court since *Douglas* has ever held that an indigent defendant may be denied the assistance of appellate counsel for a first-tier, merit-based appeal, even if that first appeal is by leave and even if it follows a plea-based conviction. The relatively few courts to reach the question have uniformly held, with the exception of *Bulger*, that counsel must be appointed for first-tier applications for leave to appeal, *See e.g., Cabaniis v Cunningham*, 143 SE2d 911, 913-914 (Va 1965) (holding that counsel must be appointed for first-tier petition to appeal to Virginia appellate court); *State v Trowell*, 739 SO 2d 77, 80-81 (Fla 1991) (holding that *Douglas* guarantees counsel for petition to appeal from guilty plea); *Perez v State*, 4 SW 3d 305, 307 (Tex Ct App 1999) (same). *See also, Bundy v Wilson*, 815 F 2d 125, 136-142 (CA 1 1987) (failure to provide transcript or opportunity to file written brief to New Hampshire Supreme Court on first-tier appeal by leave violates due process).

procedure. See Penry v Lynaugh, 492 US 302, 318-19; 109 S Ct 2934; 106 L Ed 2d 256 (1989) (finding no new rule under Teague).

Even under Michigan's traditional state retroactivity analysis, *Halbert* is not a new rule. A new rule is made in Michigan where "clear precedent is overruled or when an issue of first impression whose resolution was not clearly foreshadowed is decided." *People v Sexton*, 458 Mich at 60-61; *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982). As shown above, *Halbert* is not a new rule. *Halbert* neither overruled its own precedent, nor did it decide a case of first impression when it held that Michigan violated *Douglas*. Although it abrogated this Court's decision in *People v Bulger, supra*, that precedent itself was far from "clear and uncontradicted" given the numerous challenges to Michigan's practice and the slew of federal cases determining that the practice at issue violated the constitution. *See Mata v Egeler, supra; Tesmer v Granholm, supra.* This Court cannot label *Halbert* a "new rule" simply because the United States Supreme Court rejected Michigan's attempt to limit the holding of Douglas.

Even if *Halbert* Were a New Rule, It is a Watershed Rule

Under *Teague*, a new rule will be applied retroactively where one of two exceptions is met. First, the new rule must place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 US at 307(quoting *Mackey v United States*, 401 US at 692 (Harlan, J., concurring in part, dissenting in part)). This exception is not pertinent to the discussion at hand.

Second, a new rule applies retroactively if it reflects "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v Parks*, 494 US 484, 495; 110 S Ct 1257; 108 L Ed 2d 415 (1990). To reach this level, a new

rule must reflect procedure that is "central to an accurate determination of innocence or guilt." *Teague*, 489 US at 313. *Graham*, 506 US at 478.

The Supreme Court has repeatedly referred to the right to counsel, and only this right, as an example of a watershed rule falling under the second Teague exception. *Beard v Banks, supra* at 2514; *Saffle, supra* at 495. This was recently recognized by Eleventh Circuit Court of Appeals in addressing the retroactivity of *Alabama v Shelton*, 535 US 654; 122 S Ct 1764; 152 L Ed 2d 888 (2002). In *Howard v United States*, the court held that *Shelton* announced a watershed rule of criminal procedure because it involved the right to counsel:

> The lesson of all these [Supreme Court] decisions, we believe, is that the second *Teague* exception is so tight that very few new rules will ever squeeze through it. The exception that proves the exception, however, is a new *Gideon*-related rule. Over and over again, the Supreme Court and this Court have held up *Gideon* as the paradigm case for the second *Teague* exception. * * * The pre-*Teague* retroactivity decisions dealing with the right to counsel indicate that each extension of that groundbreaking decision has itself been treated with the worshipful respect accorded *Gideon* itself. The inference we draw is that is it the sheer importance of the right to counsel that is primary in the analysis, not the incremental extension of that right in the case at hand. At the risk of oversimplification, for purposes of the second *Teague* exception there are new rules, and then there are new *Gideon*-extension rules. The *Shelton* decision fits within the second category [*Howard v United States*, 374 F.3d at 1079]

The *Howard* Court reviewed the Supreme Court's previous pronouncements on the retroactivity of right to counsel cases and concluded that "[a] score that is perfect packs punch in any analysis":

> Overshadowing our consideration of whether *Shelton's* extension of the right to counsel should be made retroactively applicable is one momentous fact: Every extension of the right to counsel from *Gideon* through *Argersinger* has been applied retroactively to collateral proceedings by the Supreme Court. The holding of *Gideon* itself, which established the right to counsel in all felony convictions, 372 U.S. at 344-45, 83 S. Ct. at 796-97, was judged to be retroactively applicable in *Kitchens v. Smith*, 401 U.S. 847, 847, 91 S. Ct. 1089, 1090, 28 L.Ed.2d 519 (1971). The right to counsel at plea hearings, recognized in *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050,

10 L.E.2d 193 (1963), was held to be retroactively applicable in *Arsenault v. Massachusetts*, 393 U.S. 5, 6, 89 S.Ct. 35, 36, 21 L.Ed.2d 5 (1968). The right to counsel at probation revocation hearings, announced in *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), was held to be retroactively applicable in *McConnell v. Rhay*, 393 U.S. 2, 3-4, 89 S.Ct. 32, 33-34, 21 L.Ed.2d 2 91968). The right to counsel on appeal, recognized in *Douglas v California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), has also been retroactively applied. See *McConnell*, 393 U.S. at 3, 89 S. Ct. at 33. Finally, *Argersinger's* extension of the right to counsel to any prosecution leading to actual imprisonment was deemed retroactively applicable in *Berry v. City of Cincinnati*, 414 U.S. 29, 29-30, 94 S.Ct. 193, 194, 38 L.E. 2d 187 (1973). [*Howard*, 374 F 3d at 1077-1087.] [7]

Halbert's rule guaranteeing the right to counsel on appeal undoubtedly falls within the second *Teague* exception. On at least five separate occasions the Court has emphasized the right to counsel *on appeal* as being critical to the accuracy and reliability of the conviction process:

> The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial *or to deny a full opportunity to appeal* a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. [*Stovall v Denno*, 388 US 293, 297; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); Emphasis added.]

> However, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process is necessarily a matter of degree," . . . . Thus, although the rule requiring the assistance of counsel at a lineup [citation omitted] is "aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence," we held that the probabilities of infecting the integrity of the truth-determining process by denial of counsel at the lineup were sufficiently less than the *omission of counsel at the*

[7] *Howard* was perhaps overly enthusiastic in concluding that *every* right to counsel case has been applied retroactively. The Supreme Court did not grant full retroactive application to its decision in *United States v Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (right to counsel at post-indictment lineup). *Stovall v Denno*, 388 US 293 87 S Ct 1967 18 L Ed 2d 199 (1967). And it did not grant full retroactive application to its rule that counsel was required at a preliminary hearing. *Adams v Illinois*, 405 US 278, 280-281 92 S Ct 916 31 L Ed 2d 202 (1972). *Adams* made clear, however, that the right to counsel *on appeal* must be given full retroactive effect. 405 US at 280.

trial itself or on appeal.... [*Adams v Illinois*, 405 US 278, 281; 92 S Ct 916; 31 L Ed 2d 202 (1972); Emphasis added.]

> The right to counsel at the trial ... on appeal, and at the other 'critical' stages of the criminal proceedings have all been made retroactive, since the "denial of the right must almost invariably deny a fair trial. [*Arsenault v Massachusetts*, 393 US 5, 6; 89 S Ct 35; 21 L Ed 2d 5 (1968).]

> The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over. [*Penson v Ohio*, 488 US 75, 85; 109 S Ct 346; 102 L Ed 2d 300 (1988).]

> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. [*Griffin v Illinois*, 351 US 12, 18; 76 S Ct 585; 100 L Ed 891 (1956).]

The above cases leave little doubt that the right to counsel on appeal must be considered a watershed rule of criminal procedure and given full retroactive effect. The assistance of counsel on appeal protects valuable rights that are essential to the accuracy and integrity of the truth-finding process. This is true whether the defendant pleads guilty or stands trial. The Supreme Court in *Halbert* saw no reason to distinguish between plea-based and trial-based appeals for purposes of the right to counsel on appeal:

> Appeals by defendants convicted on their pleas may involve "myriad and often complicated" substantive issues, *Kowalski*, 543 U.S., at ----, 125 S.Ct., at 576 (GINSBURG, J., dissenting), and may be "no less complex than other appeals," *id.*, at ----, 125 S.Ct., at 574 (same). One who pleads guilty or nolo contendere may still raise on appeal "constitutional defects that are irrelevant to his factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the

> preliminary examination, preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel." Ibid. (quoting *Bulger*, 462 Mich., at 561, 614 N.W.2d, at 133-134 (Cavanagh, J., dissenting) (citations omitted)). [125 S Ct at 2593.]

There can be no serious question that appellate review of plea-based convictions ensures the accuracy and reliability of the truth-finding function.[8] It is well documented that innocent defendants plead guilty for fear of losing at trial and the risk of a higher sentence. Hessick and Saujani, *Plea Bargaining and Convicting the Innocent; The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B Y U J Pub Law 189 (2002). *See also,* Lester, *System Failure: The Case For Supplanting Negotiation With Mediation in Plea Bargaining*, 20 Ohio St. J. on Disp Resol 563 (2005). The specter of an innocent defendant pleading guilty is even more likely where the prosecutor offers especially enticing plea concessions (e.g., a sentence of time served). Hessick and Saujani, *supra* at 199. In fact, innocent defendants are arguably more risk adverse than the criminal who was willing to risk breaking the law in the first place. *Id.* at 202; Lester, *supra* at 569.

Innocent defendants may be coerced to plead guilty for a variety of improper reasons including threats of physical harm, *People v Johnson*, 386 Mich 305; 192 NW2d 482 (1971), illusory plea bargains, *People v Bollinger*, 224 Mich App 491; 569 NW2d 646 (1997), ineffective assistance of trial counsel, *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993), or improper pressure exerted by the trial judge, *People v Weatherford*, 132 Mich App 165; 346 NW2d 920 (1984). One famous example of an innocent defendant who not only pled

[8]The right to counsel at a plea proceeding was accorded full retroactivity in *Arsenault v Massachusetts*, 393 US 5 89 S Ct 35 21 L Ed 2d 5 (1968), because denial of the right to counsel at a critical stage, including the plea hearing, "almost invariably denies a fair trial." *Arsenault*, 393 US at 6, quoting *Stovall v Denno*, 388 US 293, 297 87 S Ct 1967 18 L Ed 2d 1199 (1967).

guilty but confessed to the police is Christopher Ochoa. Mr. Ochoa admitted murdering two men after police threats and harassment and promises of the death penalty. *See http://www.law.wisc.edu/fjr/innocence/ochoa_summary.htm; http://www.innocenceproject.org/case/display_profile.php?id+84.* He was exonerated several years later when another man confessed to the crimes and DNA evidence eliminated Mr. Ochoa as the perpetrator. *Id.* For Mr. Ochoa and others like him, appellate review of a plea-based conviction is a necessity, not a luxury.

Appellate review of sentencing is equally important. In holding that the Sixth Amendment right to counsel attaches at sentencing and is fully retroactive, the United States Supreme Court made clear that as in other contexts, the right to counsel at sentencing, "relates to 'the very integrity of the fact-finding process.'" *McConnell v Rhay*, 393 US 2, 3-4; 89 S Ct 32; 21 L Ed 2d 2 (1968). The importance of counsel to the integrity of the fact-finding process in no way diminishes as a case moves from sentencing to appeal. *See Penson*, 358 US at 85.

In plea appeals in particular, sentencing relief is the primary form of relief sought and granted. Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 72 U Det Mercy L Rev 431, 438 (1996). It is well recognized that "bargaining over the duration of the sentence is the primary focus of plea bargaining." *People v Killebrew*, 416 Mich 189, 201; 330 NW2d 834 (1982). The defendant who pleads guilty "wants to know in advance what will happen to him when he leaves the courtroom; he is bargaining for the length of his incarceration." *Id.* at 200. For those reasons, sentencing errors play a critical role in plea appeals.

The relatively high relief rate in plea appeals also solidly demonstrates the importance of appellate review and the need for counsel in this context. In Michigan, the relief rate for plea

appeals ranges from 12 to 47 percent. Matuszak, *supra* at 443.[9] Likewise, a National Center for State Courts study of five states found that when sentencing issues were raised on appeal, the appellate courts found error 25 percent of the time. National Center for State Courts, Understanding Reversible Error in Criminal Appeals 18-19 (1989). *See also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const L Q 127, 190-191 (1995) (discussing study finding 24 percent of plea appeals in two appellate courts resulted in defendants receiving relief). And given that anywhere from 75 and 90 percent of all criminal cases are resolved by guilty plea, *Duncan v Louisiana*, 391 US 145, 190; 88 S Ct 1444; 20 L Ed 2d 491 (1968); Dressler and Thomas, Criminal Procedure: *Principles, Policies and Perspectives* (West, 2003) p. 991, the sum total of relief afforded in guilty plea appeals (whether 12, 25 or 47 percent) is more than significant.

In light of the Court's repeated and unequivocal approval of the right to counsel on appeal (including plea appeals), and the lack of any suggestion that the right to appellate counsel holds less value than the right to trial counsel,[10] the Supreme Could would surely conclude that *Halbert* qualifies as a watershed rule of criminal procedure.

Halbert Is Fully Retroactive Under Michigan's Traditional Retroactivity Analysis:

Should this Court apply its traditional retroactivity analysis to this case, it must conclude that *Halbert* is fully retroactive. In Michigan, there is a presumption of complete retroactivity of judicial decisions. *People v Sexton, supra*, *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998). "Complete prospective application has generally been limited to decisions which overrule *clear and uncontradicted* case law." *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627

[9]Not all defendants pursue the appeal after consulting with appellate counsel in plea cases. *Halbert*, 125 S Ct at 2594.
[10]*Gideon v Wainwright*, 372 US 335 83 S Ct 792 9 L Ed 2d 799 (1963).

(1996) (emphasis added) (*quoting Hyde v Univ. of Michigan Bd. of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986)).

This Court has employed the three-part test of *Linkletter v Walker, supra*, for retroactivity, which considers: (1) the purpose of the new rule; (2) the general reliance on the old rule, and (3) the effect of retroactive application of the new rule on the administration of justice. *People v Sexton*, 458 Mich at 60-61; *People v Hampton, supra*.

The final two factors of the above test are dispensed with when the rule at issue deals with a fundamental right designed to ensure the accuracy of the truth-finding process:

> The most important factor is the first one. *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). In fact, the Court has said:
>
> "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious question about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971). [*People v Woods*, 416 Mich 581, 618; 331 N W 2d 707.]

The right to counsel at trial, on appeal, and at some forms of arraignment are instances where the second and third prongs of the *Linkletter* test do not apply. *Adams v Illinois*, 405 US at 280-81.

Full retroactivity of *Halbert* is mandated under the first prong of the *Hampton-Linkletter* test without consideration of the final two factors. The purpose and importance of the *Halbert* rule cannot be overstated. The right to counsel on appeal "is among the most fundamental of rights." *Penson v Ohio*, 488 US at 84; *see also Evitts v Lucey, supra*. Denying the right to appellate counsel renders an appeal "presumptively unreliable" and fundamentally unfair such

that it creates a structural defect. *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Penson*, 488 US at 88. Thus, the *Halbert* rule not only protects the right to appellate counsel, but also the right to meaningful appeal.

Moreover, the second and third prongs of the *Hampton-Linkletter* test either favor full retroactivity or fail to rebut the presumption of retroactivity.[11] When a decision overrules settled law, courts can expect more reasonable reliance upon the old rule than when the law was unsettled or unknown. *Sexton*, 458 Mich at 63-64. Because of this, "[j]udicial decisions are generally given complete retroactive effect unless the decisions are unexpected or indefensible." Id. (citing *People v Markham*, 397 Mich 530; 245 N W 2d 41 (1976), and *Doyle*, 451 Mich at 104)).

The United States Supreme Court did not overturn any of its prior decisions in *Halbert*. And the *Halbert* Court did not reach an indefensible result in light of the clear foreshadowing of its decision, both by *Douglas* and by several lower court rulings. Thus, it was arguably unreasonable for Michigan courts to assume they could rely without future penalty on *People v Bulger, supra,* in light of the widespread rejection and criticism of that case in the federal courts, and the numerous challenges to Michigan's practice of denying appellate counsel in this context dating back to 1974. *See Mata, supra; see also Kowalski v Tesmer*, 125 S Ct at 566 (noting that a day before the Michigan statute denying appellate counsel to plea convicted defendants took effect, a federal district court ruled the statute and practice unconstitutional).[12]

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[11] The second and third criteria are often dealt with together because the level of reliance will usually dictate the effect on the administration of justice. *People* v *Sexton,* 458 Mich at 63.

[12] Indeed, this Court recognized the possibility of a result contrary to *Bulger*, noting that the statute barring appellate counsel for plea convicted defendants was the "system we will come to know in Michigan. . . barring a successful challenge on constitutional grounds." (emphasis added) *Bulger*, 462 Mich at 520, n 9.

As to the impact on the administration of justice, retroactive application of *Halbert* will concededly carry costs and, possibly, revive prior appeals. But any resultant (and as of yet undetermined) cost must be weighed against the advantages of providing counsel in plea appeals. Given the rate of relief in plea appeals, and given that most relief comes in the form of sentencing relief, the State will arguably recoup a significant portion of the cost of appellate counsel through decreased incarceration terms for indigent defendants.[13] Moreover, as the *Halbert* Court explained, providing appellate counsel will likely facilitate meaningful, orderly, and efficient review of past and future guilty plea cases:

> Providing indigents with appellate counsel will yield applications easier to comprehend. Michigan's Court of Appeals would still have recourse to summary denials of leave applications in cases not warranting further review. And when a defendant's case presents no genuinely arguable issue, appointed counsel may so inform the court. *See Anders v. California*, 386 US. 738, 744, 87 S. Ct 1396, 18 L. Ed. 2d 493 (1967). [125 S Ct at 2594.]

This Court has already agreed in principle with the above assessment. *See Bulger*, 462 Mich at 520 ("No one questions that the appointment of appellate counsel at state expense would be more efficient and helpful not only to defendants, but also to the appellate courts").

In light of the near-negligible cost of appellate counsel[14] and the undeniable service provided by appellate counsel, the effect on the administration of justice must be viewed as a positive factor. It certainly cannot be said that the third prong of the *Hampton-Linkletter* test is so unfavorable to defendants like Mr. Houlihan that it overcomes the presumption of full retroactivity. *See People v Sexton*, 458 Mich 63-64.

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[13] If as indicated in Issue II, Mr. Houlihan is eligible for parole after 16 years (rather than 20), appellate counsel will have saved the state approximately $99,000. Annual Report 2003, Michigan Department of Corrections, p. 31 (annual incarceration cost of $24,680).

[14] Appellate fees for plea appeals range generally from $350 to $800 per case (with some counties allowing attorneys to charge per hour). Appellate Assigned Counsel Fees By Circuit, 2003, Vol 26, No. 7 Criminal Defense Newsletter (April 2003).

Conclusion

Halbert is not a "new rule" under either Michigan or federal precedent. The restrictive *Teague* approach for retroactivity, and even the traditional Michigan test for retroactivity, both require that *Halbert* be given full retroactive effect. And considering the importance of appellate counsel in plea appeals and the relatively low cost of appointing counsel (versus the recognized gain when defendants are represented), this Court should conclude that the overall effect on the administration of justice is positive and there is little to be gained by limiting *Halbert* to cases pending on direct review.

B. MR. HOULIHAN'S CONVICTION IS NOT FINAL, AND THEREFORE HALBERT APPLIES TO HIM UNDER GRIFFITH V KENTUCKY.

As indicated earlier, Mr. Houlihan does not agree that his case should be considered as arising on collateral review. He was deprived of any meaningful direct appeal by actions of the State, and consequently his case should be considered still pending on direct review. *See, Frasch v Peguese,* 414 F3d 518 (CA 4 2005) (where defendant sought and won habeas corpus relief based on ineffective assistance of state appellate counsel, direct review period did not expire until direct appeal was completed following habeas corpus order directing discharge or direct review by state court).

Decisions of the United States Supreme Court addressing a federal constitutional right "apply retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708, 93 L Ed 2d 649 (1987). See also, Sexton, supra.

Although the prosecutor asserts that the direct appeal period expired in 2003,[15] this Court should conclude that the direct appeal period remains open for Mr. Houlihan. Concepts of equitable or judicial tolling should apply. "[E]quitable tolling operates to relieve the "strict command" of a legislatively prescribed limitation because of 'considerations "[d]eeply rooted in our jurisprudence." *Devillers v Automobile Club Insurance Association*, 473 Mich 562, 595; 702 NW2d 539 (2005) (Cavanagh, J., dissenting), quoting *Glus v Brooklyn Eastern Terminal*, 359 U.S. 231, 232, 79 S Ct 760, 3 L Ed 2d 770 (1959). "[I]n cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, *Glus v Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 . . .this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." *American Pipe & Constr. Co. v Utah*, 414 US 538, 539; 94 S Ct 756; 38 L Ed 2d 713 (1974). *See also, United States Fidelity & Guaranty Co. v Amerisure Ins. Co.*, 195 Mich App 1, 6; 489 NW2d 115 (1992)("Michigan and federal case law provide precedent for the principle that limitation statutes are not entirely rigid, allowing judicial tolling under certain circumstances[.]")

While undoubtedly Mr. Houlihan had the opportunity to pursue a direct appeal to the Court of Appeals (and he did so solely challenging the denial of appellate counsel), that opportunity was meaningless and hollow because he lacked the assistance of counsel. *See Halbert*, 125 S Ct at 2585 (noting that "a pro se applicant's entitlement to seek leave to appeal to Michigan's intermediate court may be more formal than real.") Individuals cannot be expected to perfect a direct appeal without the necessary tools to do so, including a lawyer. *Halbert*,

[15] The prosecutor does not allege a specific date, but its analysis (that the direct appeal period expired after the order of the Michigan Supreme Court denying leave to appeal and the time for filing a petition for writ of certiorari had expired, would suggest a date of December 12, 2003.

supra; Douglas v California, supra; Griffin v Illinois, supra. There is no question that a lay person cannot be expected to handle adequately the intricacies of the appellate process. *Douglas v California*, 372 US at 358; *Evitts v Lucey*, supra.[16]

Where the direct appeal period was never adequately provided to this defendant, the Court should consider the direct appeal period tolled. This Court has twice permitted out-of-time direct appeals where the circumstances warranted it. *People v Kellie*, 456 Mich 909; 572 NW2d 659 (1997) (where error in denying appellate counsel, Supreme Court directs Court of Appeals to "treat as timely under MCR 7.205(F)(3) any delayed application for leave to appeal filed within 42 days of the filing of the transcripts"); *People v Brazil*, 456 Mich 1227 (1998) (directs Court of Appeals to accept as timely a delayed application for leave to appeal filed 13 months after sentencing under the unique circumstances of the case).

For the above reasons, the Court should conclude that the direct review period has not expired and should offer a reasonable period of time for the filing of any new or supplemental application for leave to appeal in the Court of Appeals by appointed appellate counsel.

C. CONCLUSION

When all is said and done, the fact remains that Mr. Houlihan has not had his day in court for purposes of direct appellate review. Like many defendants coming before and after him, he seeks that *one* opportunity for error-correction, first-tier review by the Court of Appeals. He is entitled to that review, and he is entitled to the assistance of appointed appellate counsel under *Halbert v Michigan.*

[16] At one point in the appellate process, Mr. Houlihan lost the ability to pursue the appeal from file 01-002733 as he "failed to produce any order denying a motion for relief from judgment that bears that lower court number." *Order of November 3, 2004* (Appendix C).

II. MR. HOULIHAN IS ENTITLED TO DISCIPLINARY CREDITS AGAINST THE MINIMUM AND MAXIMUM TERMS OF HIS SENTENCE BECAUSE "TRUTH AND SENTENCING" LAWS DO NOT APPLY.

While the prosecutor argues that Mr. Houlihan can show no basis to invalidate his guilty plea, the prosecutor fails to note an important sentencing mistake that occurred in this case. Because the instant offense involved first-degree criminal sexual conduct occurring before October 22, 1997 (PT 10; Information, Appendix D), Mr. Houlihan is entitled to receive disciplinary credits off the minimum and maximum terms of this sentence. MCL 800.33(5). As a matter of law, he is entitled to a reduction of five days per month (subject to forfeiture), and he is eligible for an additional two days per month with the approval of the warden. MCL 800.33(5).

In other words, his present 20-year minimum term could be reduced by more than four years for parole eligibility purposes.

It is only when the offense occurs after December 15, 1998, that an offender convicted of a violent or assaultive crime[17] would be subject to the harsh effects of Truth in Sentencing, MCL 800.34(5)(a), and would be ineligible to receive any reductions of his minimum or maximum terms. MCL 800.33(14).

In the presentence report, the Basic Information Report (BIR) correctly shows the date of the offense as "6/18/97-10/21/97" (BIR, Appendix E), but the body of the presentence report is less than clear as to the date of the offense (PSI pp. 2-6). The Michigan Department of Corrections (MDOC) has calculated the offense date as February 27, 2001 (Offender Tracking Information Service, Appendix F). The projected release dates set forth for Mr. Houlihan by

[17] Truth in Sentencing took effect for all felony offenses as of December 15, 2000. MCL 800.34(5)(b).

OTIS, shows that he will have to serve all of his 20-year minimum term before he becomes eligible for parole (i.e., his first potential release date is March 1, 2021).[18] *Id.*

This error must be corrected and may, through the courts, require correction and clarification of the presentence report. *See, People v Norman*, 148 Mich App 273, 275-276; 384 NW2d 147 (1986) (important institutional decisions are made by the prison based on information in presentence report).

Accordingly, Mr. Houlihan has demonstrated the value of appointed appellate counsel on the facts of his case.[19]

[18] The sentence began on March 2, 2001 as a result of jail credit (see Judgment of Sentence, Appendix G).

[19] The error regarding disciplinary credits is but one error noticed by appellate counsel during the short period in which counsel has represented Mr. Houlihan, and should not preclude the raising of other arguments on direct appeal.

SUMMARY AND RELIEF

Defendant-Appellant asks this Honorable Court to reinstate his direct appeal and remand for the appointment of an appellate counsel and the filing of a new or supplemental application for leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Date: October 28, 2005